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APR 30

CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No. 43

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, SECOND DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

ROBERT B. MURPHEY,
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No. 852.

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellants, in support of the jurisdiction of this court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provision Sustaining Jurisdiction.

By the Act of February 13, 1925, chapter 229, section 1, 43 Stat. 937 (U. S. Code, Title 28, Sec. 344), section 237 of the Judicial Code was amended to read in part as follows:

> "(a) *A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had,* where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution,* treaties, or laws *of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.* The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ." (Italics ours.)

The Act of January 31, 1928, chapter 14, 45 Stat. 54, provides as follows:

> "That the writ of error in cases civil and criminal is abolished. *All relief which heretofore could be obtained by writ of errors shall hereafter be obtained by appeal."* (Italics ours.)

The Act of April 2, 1928, chapter 440, 45 Stat. 468, amends section 2 of the Act of January 31, 1928, to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Decree and Date of Application for Appeal.

The judgment or order sought to be reviewed was rendered on November 29, 1930. [R. * 363½.] This appeal is to review a judgment of the District Court of Appeal of the state of California, Second Appellate District, Second Division, denying appellants' petition for a peremptory writ of prohibition [R. 1] to prevent the Superior Court of Los Angeles county from enforcing a preliminary injunction against appellants or taking further proceedings against appellants in an action brought by the State of California under a statute of that state, hereinafter referred to, to enjoin the alleged "unreasonable waste of natural gas" by appellants and others in Santa Fe Springs oil field. By said petition for writ of prohibition there was drawn in question the validity of the statute of California under which said suit was brought prohibiting the unreasonable waste of natural gas, upon the ground that said statute is repugnant to the Constitution of the United States. An alternative writ of prohibition [R. 328] had heretofore been issued on the 9th day of April,

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*All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court of Appeal of the state of California in and for the Second Appellate District, Second Division, and on file with the clerk of said court. The record has not yet been printed.

1930. [R. 327½.] The opinion of said District Court of Appeal [R. 333] is not yet officially reported, but is found in the Advance Sheets at 63 Cal. App. Dec. 1175. On December 19, 1930, appellants petitioned said court for a rehearing, which petition was timely filed [R. 364] and which was denied by said court on December 27, 1930. [R. 486.] On January 8, 1931, appellants petitioned the Supreme Court of California for an order for a transfer to and a hearing of said cause by said court, which petition was timely filed [R. 487] and which was denied by said court on January 26, 1931. [R. 671½.]

The petition for appeal and prayer for reversal, together with the assignment of errors by appellants [R. 676] were presented to and allowed on January 29, 1931, by the presiding justice of said District Court of Appeal [R. 692], which was the highest court in the state in which a decision in the cause could be had.

C.

Nature of Case and Rulings Below.

As a preface to a showing, with definite references to the pertinent pages of the record, that the nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions of section 237 (a) of the United States Judicial Code relied on, the following brief statement of the case is submitted:

The case comes to this court on an admitted statement of facts, which is set forth in the Petition for Writ of Prohibition filed in the lower court. [R. 1.] The allegations of this petition are admitted to be true by the demurrer [R. 331], which was the only return filed thereto.

It appears from this petition that on September 11, 1929, the People of the State of California, on relation of Fred G. Stevenot, Director of Natural Resources of said state (hereinafter referred to as "the State") commenced an action in the Superior Court of the state of California, in and for the county of Los Angeles, against each of appellants and various other owners and/or operators of oil wells in Santa Fe Springs oil field, in Los Angeles county, California, seeking to enjoin the alleged "unreasonable waste of natural gas" in said field. [R. 4.] Said suit was commenced and maintained solely under the supposed authority of sections 8*b* and 14*b*, amended in 1929, and amendatory of a statute of California entitled "An Act to Protect the Natural Resources of Petroleum and Gas from Waste and Destruction," etc. (Stat. Cal. 1915, ch. 718, as amended by Stat. Cal. 1917, ch. 759, as amended by Stat. Cal. 1919, ch. 536, as amended by Stat. Cal. 1921, ch. 912, as amended by Stat. Cal. 1929, ch. 535.) Full text of the material and pertinent provisions of said statute is set forth in Appendix A to this statement.

Sections 8*b* and 14*b* of said statute, which were added by amendment in 1929, we quote for the convenience of the court:

> "SEC. 8*b*. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste."
>
> "SEC. 14*b*. Whenever it appears to the director of the department of natural resources that the owners,

lessors, lessees or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the state of California, to enjoin such unreasonable waste of gas regardless of whether proceedings have or have not been instituted under section 8 hereof, and regardless of whether an order has or has not been made therein. Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are situated. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued *ex parte*, but otherwise the procedure shall be governed by the provisions of chapter three, title seven, part two of the Code of Civil Procedure of the state of California, and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise."

The petition for a writ of prohibition [R. 1], after alleging the filing of the complaint [R. 34], the issuance of an order to show cause why a preliminary injunction should not be made [R. 58], the filing of affidavits and authorities [R. 34-97], the amendment to the complaint [R. 264], and the filing by appellants of a demurrer to the complaint [R. 98], answer [R. 127], affidavits [R. 186-263], demurrer to said complaint as amended [R. 270], and amendment to answer [R. 275], and annexing as exhibits a copy of said pleadings and affidavits [R. 30-298], alleges certain facts which it is alleged appeared from the uncontradicted evidence introduced upon the

hearing of said order to show cause [R. 7-14], all of which the demurrer to the petition for writ of prohibition admits. These admitted and uncontradicted facts are summarized here, for the reason that it is well established that where the facts upon the basis of which a Federal right is asserted, are set out in the pleadings and are admitted by demurrer, this court is not bound by conclusions of the highest court of the state as to their effect but will analyze the facts as averred and draw its own inferences as to their ultimate effect (*Truax v. Corrigan,* 257 U. S. 312, and cases therein cited), and will also examine the facts to determine whether or not the basis of facts upon which the state court rests its decision denying an asserted Federal right is without support in the record. (See cases cited under point "*D*," of accompanying brief of appellants in opposition to motion to dismiss or affirm.)

Uncontradicted and Admitted Facts.

The use of natural gas as a propelling force in moving and producing oil is prevalent throughout the state of California and is in accordance with universal custom. [R. 7.] In fact, the chief and primary value of the natural gas produced from flowing oil wells is in flowing oil to such wells and lifting the oil produced therefrom to the surface. [R. 9.] Indeed, none of the oil produced from flowing wells in said Santa Fe Springs oil field could be produced without the utilization of the lifting force of the gas held under high pressure in solution with the oil. [R. 8.] When a well penetrates an oil and gas zone in such field the pressure is released from about the well causing the oil and gas to flow toward the point of lower

pressure at the well. This does not cause a drop and disturbance in the pressure throughout the zone but only in the immediate vicinity of the well. [R. 131-132, 136, 6 par. 4.] The oil and gas underlying any given surface area is fixed in place and does not move beyond the immediate vicinity of a penetrating well. [R. 132, 6 par. 4.]

> "The major and primary value of the oil and gas deposits in each of the zones in Santa Fe Springs oil field is in the oil content thereof which is of far greater value than the gas content." [R. 156, 6 par. 4.]

ALL of the operators in the field are operating their wells primarily and chiefly for the oil produced, and the production of gas therefrom is incidental and a necessary result of the *utilization* of the gas for the highly beneficial purpose of producing oil. [R. 9.] It is not and will not be possible for any of appellants to operate any of their wells and to produce oil therefrom without the production of natural gas in reasonable quantities as a necessary concomitant. [R. 8.] What is a reasonable proportion of natural gas to the amount of oil produced from the same well in Santa Fe Springs oil field, varies widely in different parts of said field and in different parts of the same producing zone and varies with each well penetrating any zone in said field with the age of the well, increasing frequently as the well becomes older, *and is governed largely by natural conditions which cannot be controlled to any great extent.* [R. 8, 133-134, 6.]

Appellants are the owners of fee simple and leasehold estates in various properties specifically set forth and described [R. 6, 166, 175], most of its properties being leasehold estates. By the terms of the leases creating

said leasehold estates, the lessee is required, as long as petroleum in paying quantities can be produced therefrom, to operate each well thereon *diligently* and in good faith, with the exception of two leases therein described, by the terms of which the lessee is required to operate each well thereon to its *maximum capacity*. All of said leases contain a provision that the lease may be forfeited by the lessors upon notice of from thirty to ninety days if the lessee fails to comply with any of the provisions therein set forth to be performed by the lessee thereunder. [R. 6, 175-176.] The reasonable value of these leasehold estates and the buildings, riggins, equipment and other property thereon belonging to appellants is in excess of $21,000,000. [R. 179-180.] *No natural gas is being produced by any of appellants from any oil well or wells in said oil field in any quantity exceeding a reasonable proportion to the amount of oil produced therefrom, or in a quantity more than is reasonably or necessarily required in the production of oil therefrom in accordance with efficient methods and appliances.* [R. 8, 12.] *Each of the wells of appellants in said field is efficiently operated, and is so operated that it does not injuriously affect the operations of others owning and/or operating wells in said field.* [R. 13.] The gas-oil ratio of each well producing oil and gas is a fair index to the efficiency of such well in the reasonable utilization of natural gas in the production of oil, and *the gas-oil ratio of the wells of appellants is the third lowest amongst the nine largest producers of oil in said field.* [R. 13.]

It also appears from appellants' answer to the complaint (the allegations and denials of which are re-alleged and

incorporated in the petition for writ of prohibition [R. 6] and are *admitted by the demurrer* to the petition for writ of prohibition) that the quantity of gas which comes out of each of the wells of appellants in the production of oil is a reasonable and not a wasteful quantity of gas [R. 139]; that the use and utilization by each of appellants "of such quantities of natural gas in producing said oil is a useful and beneficial use thereof and is not a waste or unreasonable waste thereof." [R. 139-141.] The operations of appellants' wells are not such that any other owners or operators in the field "will be deprived of their or any of their share of the natural gas and/or oil * * * or are or will be injured or damaged in any respect whatever." [R. 142-143.] None of appellants "is producing from any of its respective wells an undue or unreasonable amount of oil and/or gas or is taking from any sand penetrated by any of its respective wells more than its just share or proportion of the oil and/or gas in any such zone. * * * Each of said wells has been so drilled, completed and operated, and is so operated, * * * as not to interfere with, injure or damage the interests or rights of neighboring property owners, lessees or operators." [R. 155-156.]

The petition for the writ of prohibition alleges, and the demurrer thereto admits that on March 16, 1930, three days before the date of the preliminary injunction hereinafter referred to, appellants were producing 19,554 barrels of net oil per day (by "net" is meant after taking out impurities, water content, etc.), and the amount of natural gas reasonably required to be utilized to flow and lift that amount of oil to and out of the wells was 57,120,000 cubic feet per day under efficient methods.

[R. 10-11.] The market value of a barrel of crude oil on said date was, and is now, $1.60 a barrel [R. 19], so that the market value of the oil produced daily by appellants on March 16, 1930, was approximately $31,286.40. The oil production of petitioners on March 20, 1930, was 19,416 barrels. [See schedule, R. 15.]

In addition to this most valuable, reasonable and efficient *utilization* of the natural gas in producing said quantity and value of oil (*viz.*, in lifting and flowing the oil to the surface, which could not otherwise have been produced), all natural gas produced by appellants was and is *further utilized* in the manufacture of casing-head gasoline of the approximate value on said date of $3,000.00 per day. [R. 12.] So much of the resulting dry natural gas remaining after the extraction and manufacture of such casing-head gasoline as could be utilized further was and is *still further utilized* for fuel purposes on the various leases and for field and other uses in the operations of appellants, and so much as could be sold was sold [R. 12], but the amount sold was small, and the amount received therefor was only 5¢ per thousand cubic feet, which was and is the prevailing price. [R. 19.] There was and is no other available means to any of appellants for any further utilization of the remaining dry gas, and *such remaining dry gas had and has no market value.* [R. 12.] Notwithstanding that appellants made diligent efforts during all of said time, *none of them has been able to sell or even give away such remaining dry gas.* [R. 12.] It must be used as produced, and cannot be stored except at a cost far in excess of its value. [R. 154, 156, 6.] By reason of the premises appellants were and are compelled, after making the aforesaid *manifold utilizations* thereof, to

release and permit the remaining dry gas to escape into the air. [R. 12-13.]

Notwithstanding these undisputed facts, which are admitted by the demurrer to the petition for writ of prohibition to have been established in the Superior Court by uncontradicted evidence, that court, on March 19th, 1930, acting under the supposed authority of said statute (*and for the sole purpose of conserving such natural gas for the benefit of the general public,* R. 23), made its preliminary injunction by the terms of which appellants were required to curtail their production of gas from 57,120,000 to 27,187,000 cubic feet per day [R. 16, 288-314, particularly R. 309.] The petition for the writ of prohibition alleges, and the demurrer thereto admits, that *the "sole ground" for this curtailment of appellants' gas production was "for the purpose of conserving such natural gas for the benefit of the general public."* [R. 23.] This also appears from the face of the preliminary injunction itself, which, after reciting that "There appears to be an unreasonable waste of natural gas in the Santa Fe Springs oil *field,"* and that same "may be substantially reduced * * * *by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground."* [R. 296] This the court proceeded to do by fixing such quantity at 285,000 M. C. F. per day and limiting the gas production from the field to that amount, which the court allocated amongst the various operating properties in the field, on the arbitrary basis of 1,200 cubic feet of gas for each barrel of the potential oil production from the wells on each property. [R. 296-310.] *There was no finding that any of appellants were unreasonably wasting natural gas.* The

only finding of an unreasonable waste of natural gas was as to the field as a whole. [R. 296.]

The allowed gas production to appellants is only approximately 48% of the gas required to produce the amount of oil which appellants were then producing, in operating their wells efficiently at a proper gas-oil ratio, and so as not to injuriously affect the operations of others owning and/or operating wells in said field, as aforesaid. On March 28th an order was made modifying this injunction so as to provide for new wells coming in since the original order [Appendix, R. 318], by the terms of which order the allowed gas production to appellants was slightly increased on account of such new wells to a total of 28,160,000 cubic feet per day. [See R. 16, and schedule on R. 18.] The amount of oil which can be produced by appellants with the allowed gas production under said order as modified, through the most efficient operation of such of the wells thereon as are not required to be shut in and killed, as hereinafter stated, does not exceed 10,211 barrels per day, or less than 50% of the daily net oil production of appellants at the time of the making of such preliminary injunction. [R. 14-15.] Not only this, but the enforcement of said preliminary injunction requires the shutting down and/or killing by appellants of many producing oil wells, the average cost of each of which is $150,000.00. The danger of permanent injury resulting from shutting down a well is great, particularly as to wells located on the outer edges of the field, as are many of the wells of appellants, and even to attempt to curtail the production of oil and gas from any well endangers such well. In the case of many of the wells located on the flank or edge of the field there is serious

danger of water encroachment from the edge of the field, and in some instances this has prevented, and will probably continue to prevent, replacing such wells to their former production. The decrease in the allowed gas production to appellants would also impair the ability of appellants to protect themselves against offset wells on large adjoining leaseholds. [R. 13-14.]

Immediately after the making of said preliminary injunction on March 19, 1930, appellants attempted to comply therewith, using the best skill and knowledge obtainable, with the result that four of their wells died and were killed, and eleven of their wells had to be shut in, and the gas pressure on one well became so great that it burst through the casing-head on April 2, 1930, and caught fire, burning for several days and causing considerable damage to appellants. [R. 16-17.] Said wells have been permanently and irreparably damaged, and there is serious danger that other wells of appellants, which have been or will have to be pinched back or curtailed in the production of gas if said orders are enforced, will die and that they cannot be restored to their former production. [R. 17.] Furthermore, on April 2, 1930, as the result of appellants' efforts to comply with said injunction, as aforesaid, their daily net oil production had been cut from 19,416 barrels to 11,790 barrels, and their gas production cut from 62,017 M. C. F. to 33,546 M. C. F. per day. [R. 17-19.] This results in a decrease in income and loss in oil to appellants of approximately $12,500.00 per day, and a loss of $3000 per day in casing-head gasoline. [R. 19.] In order for appellants to comply with said preliminary injunction further it would be

necessary for them to shut in and/or kill other wells, which would cause further irreparable damage. [R. 19.]

It further appears that, unless prohibited by a writ of prohibition from so doing, said orders would be enforced against appellants by contempt proceedings or other process, and *would be further modified and enforced so as to further materially decrease the amount of oil and gas which petitioners could produce,* whereby the rights and property interests of appellants would be further invaded and appellants would suffer further irreparable damage. [R. 19-20.] Under these circumstances appellants were put to the necessity of instituting said prohibition proceedings.

The admitted facts, in addition to the above, showing that petitioners have no plain, speedy and adequate remedy at law, are set forth. [R. 25-27.] *We especially call attention to the fact that plaintiffs were not required to file, and have not filed, any bond of any sort, and appellants are and will be wholly without recourse for the tremendous loss and damage sustained and to be sustained by them.* [R. 25.] *Section 14b of the statute provides that no temporary or permanent injunction granted thereunder can be stayed on appeal either by the giving of a bond or otherwise.* So that if the statute as construed and applied to appellants is repugnant to rights guaranteed to appellants by the Fourteenth Amendment of the Federal Constitution and appellants are successful on this appeal they will have no recourse whatever for the damages they have each already sustained, or for the great irreparable damage they will sustain in the future. [R. 25-27.] The effect of the preliminary injunction, by its

very existence, casts a shadow over the rights of appellants to the full and exclusive enjoyment of their property which no stay in the operation of said orders could remove, for the very existence of such orders renders their properties less valuable, less usable and less salable. [R. 26.] (See *Jacobsen v. Superior Court,* 192 Cal. 319, 330-2.)

The sole authority under which the action in the Superior Court was instituted and under which said court was acting, is derived from the provisions of sections 8*b*, 8*d*, 9 and 14*b*, and particularly sections 8*b* and 14*b* of the California statute hereinabove referred to. [R. 20.] *The term "unreasonable waste of natural gas" did not at the time of the enactment of the 1929 amendment to the state statutes involved prohibiting the "unreasonable waste of natural gas," have, and has never since acquired, any established or settled meaning by usage or custom.* [R. 21.]

The Particulars in Which the California Statute, as Construed and Applied Against Appellants, Is Claimed in the Petition for Writ of Prohibition to Be Repugnant to the Constituton of the United States, and in Which the Statute, as Construed and Applied Against Appellants, Deprives Appellants of Rights, Privileges and Immunities Under the Constitution of the United States, and the References to the Record Showing They Were Specially Set Up and Claimed by Appellants.

At pages 20-25 of the petition for writ of prohibition filed in the lower court [R. 20-25] are set forth the particulars in which the state statute involved violates the Federal Constitution and in which the Superior Court ex-

ceeded, and threatens to exceed, its jurisdiction in enforcing said statute, or proceeding further thereunder against appellants. Said petition includes, by reference [R. 24, clause *e*], the grounds of unconstitutionality of the statute under the Federal Constitution, as well as the rights asserted under the Federal Constitution as they are set forth in the answer filed by petitioners in the Superior Court (the allegations and denials of which are incorporated and realleged in the petition for writ of prohibition, R. 6), and also in the demurrer to the complaint [R. 98] and in the points and authorities annexed thereto. [R. 114.]

These federal questions, and the particular references to the record showing that they were raised, specially set up and claimed, and called to the attention of the lower courts, may be summarized as follows:

1. The California statute, under the supposed authority of which the action in the Superior Court was instituted and the orders of that court were made, is so vague, uncertain and indefinite, as to the definition, guide or standard of what constitutes "unreasonable waste of natural gas," that it violates the "due process" clause of the Fourteenth Amendment of the United States Constitution [R. 21, 99, 115-116, 118, 121, 336, 357], and therefore the orders of the Superior Court complained of, construing and applying the statute to appellants, and the enforcement thereof, are in excess of the jurisdiction of said Superior Court. [R. 20-25, 123; see Assignment of Errors Nos. 1, 7, 8 9; R. 676-680.]

2. The California statute as construed and applied to and sought to be enforced against appellants, and also

the rendition and enforcement of the preliminary injunction of the Superior Court, deprives appellants of their property without "due process" of law, in violation of the Fourteenth Amendment of the United States Constitution, and is in excess of the jurisdiction of said court;

(a) In that, under the uncontradicted and admitted facts, each of appellants' oil wells is being efficiently operated at a proper and reasonable gas-oil ratio for each well and for the field, and so as not to injuriously affect the rights or operations of other operators or owners in the same field, and the admitted sole purpose of the decrease in the allowed gas production to appellants required by them in the efficient production of oil as aforesaid is to reserve such natural gas in the ground for light, heat and power for the benefit of the general consuming public, and in that this cannot be accomplished without compensation, nor without a condemnation suit in the exercise of the power of eminent domain. [R. 23, 99, 119-121, 157-159, 164, 178-183, 6-par. 4, 336-357; see Assignment of Errors Nos. 2, 3, 4, 5, 9, 10, 14, R. 676-682.]

(b) In that, under the admitted facts, the extent of the invasion of appellants' property rights is so great, so arbitrary, so unreasonable, so oppressive, and so unrelated to and in excess of the power of the state, that it cannot be sustained under the police power of the state, and the due process clause of the Federal Constitution requires the exercise of the power of eminent domain. [R. 6, 23-24, 100, 159-164, 166, 180, 183, 336-357; see Assignment of Errors Nos. 2, 3, 4, 5, 10, 12, 14, 15, R. 676-685.]

(c) In that the *"prima facie"* evidence clause of the statute violates the due process clause of the Fourteenth Amendment. [R. 24, 115, 124, 125; see Assignment of Errors No. 13, R. 683.]

3. The California statute as construed and applied to and sought to be enforced against appellants, impairs the obligations of the oil and gas lease contracts of appellants requiring diligent drilling and operation, and in two instances to "maximum capacity," under penalty of forfeiture, all in violation of section 10 of Article I of the United States Constitution. [R. 24, 6, 100, 120, 178, 182; see Assignment of Errors No. 6, R. 678.]

4. The statute of California as construed and applied to and sought to be enforced against appellants, denies to appellants the "equal protection of the laws" guaranteed to appellants by the Fourteenth Amendment of the United States Constitution. [R. 24, 6, 121-2, 160-166; see Assignment of Errors Nos. 7, 8. 1, R. 676-679.]

5. The necessary effect of the preliminary injunction against appellants is to deprive appellants of their property without due process of law, and to deny them the equal protection of the laws, all in violation of the Fourteenth Amendment. [R. 23-24, and pages cited under items 1 to 4, above; see Assignment of Errors 8 to 15, R. 679-685.]

Not only do the foregoing references to the *record itself* show that these federal questions were presented to the lower court in the petition for writ of prohibition, as well as in the proceedings in the Superior Court forming the basis for the writ of prohibition, but the record also includes a certificate of the lower court [R. 714],

and also a stipulation of counsel [R. 718], to the effect that each of the federal questions set forth in the assignment of errors in this court [R. 676] was duly, regularly, properly and timely raised and specifically set up and claimed by appellants in the lower court, all in accordance with the laws, rules of court and the practice prevailing in California, and the validity of the statute was sustained as against each and all of the various claims of appellants of its being repugnant to the Constitution of the United States. [R. 714-717.] This certificate of the court recites:

> "That each of said questions was duly considered by this court on its merits, and the contentions of appellants respecting each of said questions were each and all denied; that a decision upon each of said questions and claims of the appellants was necessary to the decision and judgment of this court filed November 29, 1930." [R. 716.]

Although appellants are not dependent on such certificate, it may be considered and should remove all doubt. (*Consolidated Turnpike Co. v. Norfolk etc. Ry. Co.,* 228 U. S. 596, 57 L. Ed. 982; *Marvin v. Trout,* 199 U. S. 212, 50 L. Ed. 157.) The record also contains a topical index of appellants' brief in the lower court [R. 724], the petition for rehearing [R. 364] and the petition for hearing by the Supreme Court of California [R. 487], all showing these federal questions again raised. The California practice does not recognize an assignment of errors; it merely requires a "printed" brief containing the points and authorities, "relied on," with a "topical index" if same is more than 30 pages long. (See *New York ex rel. Bryant,* 278 U. S. 63, 68, 73 L. Ed. 184, 187.)

The opinion of the lower court itself, which for present purposes is deemed part of the record (*N. Y. ex rel. Bryant, supra*) shows that that court considered these federal questions as properly raised [R. 333-6], and expressly passed on all of them adversely to appellants' claims [R. 336], except as to one or two, where such was the necessary effect of the judgment. (See decisions cited under Subdivision "D" hereof, *post.*)

We quote the following brief extract from the opinion of the lower court:

> "The arguments of the petitioners may be grouped into the following propositions: First: The act deprives petitioners of property without just compensation and without due process of law. Second: The statute is void for uncertainty and for failure of the legislature to define a standard of conduct. Third: The enactment permits the use of gas for lifting purposes in a reasonable proportion to the amount of oil produced and that the uncontroverted evidence shows no other or greater use and for that reason the court was without jurisdiction to grant the temporary injunction." [R. 336.]

The lower court undoubtedly understood that the first point related to the invalidity of the statute under the "due process" clause of the Fourteenth Amendment of the Federal Constitution, and upheld the statute against this contention, as shown by the following extracts from the opinion:

> "Turning then to the first contention, *it is asserted that the act is violative of the Fourteenth Amendment to the Federal Constitution* * * *." [R. 337.]
>
> "* * * We are, therefore, irresistibly led to conclude that the statute here involved * * * *does not deprive the petitioners of property without just compensation or due process of law but rather*

falls within the legislative authority of the state with the wisdom of which we cannot be concerned." [R. 346, 352.]

The lower court undoubtedly understood the second point discussed in the opinion relating to the alleged invalidity of the statute for lack of an ascertainable or sufficient standard or measure of conduct, referred to its invalidity under the "due process" clause of the Fourteenth Amendment of the United States Constitution. This is obvious from the federal questions raised and the many decisions of this court on the subject of the certainty and definiteness required of statutes to satisfy the "due process" clause which were presented to the lower court by appellants. [R. 724-726, 367, 369.] Included amongst these cases were *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Connally v. General Construction Co.*, 271 U. S. 385; *United States v. Pennsylvania R. Co.*, 242 U. S. 208. The topical index and index of cases cited in the lower court also demonstrate that the other federal questions which the record shows were raised were argued and insisted upon by appellants. [R. 724-729, 364-370, 487-498.] In view of the fact that the appeal practice in California does not provide for the assignment of errors as is the case with reference to the practice of appellate courts in most states, but merely requires that points be raised in briefs filed, it is appropriate for this court to examine the topical index for such purpose, if there should be any doubt at all in the court's mind about the federal questions raised being presented to the state court. (See *New York ex rel. Bryant*, 278 U. S. 63, 68.) While the lower court did not expressly mention or discuss in its opinion some of the federal questions raised they were

necessarily decided adversely to appellants' contention and the statute upheld against such contention. (See citations under *D, post.*)

D.

Citation of Cases Believed to Sustain Jurisdiction.

1. The action of the District Court of Appeal of California, Second Appellate District, Second Division, in denying appellants' petition for a peremptory writ of prohibition (that court having denied a timely [R. 363½] petition for a rehearing, and the Supreme Court of California having denied a timely petition for a hearing by that court [R. 486]), was a final judgment in a suit in the highest court in the state in which a decision in the suit could be had. (*Napa Valley Electric Co. v. United States,* 251 U. S. 366; *Pacific Gas etc. Co. v. Police Court,* 251 U. S. 22; *Appleby v. Delaney,* 271 U. S. 403; *Norfolk Turnpike Co. v. Virginia,* 225 U. S. 364.)

The judgment of the lower court (District Court of Appeal of California) became final, for purposes of review in the Supreme Court of the United States, upon the date of the denial of the petition for hearing by and transfer to the Supreme Court of California. (See cases above cited, and *Citizens Bank v. Opperman,* 249 U. S. 448; *Ohio Public Service Co. v. State of Ohio,* 247 U. S. 12.)

2. Prohibition is a distinct "suit," and a judgment finally disposing of it, even though it does not determine the merits of the principal suit but only the question of whether the court in which that suit is brought is acting without or in excess of its jurisdiction, is a "final" judg-

ment within the meaning of section 237(a) of the United States Judicial Code (Act of Feb. 13, 1925, ch. 229, Sec. 1, 43 Stat. 937, U. S. Code, Title 28, Sec. 344), and also under the statutes of California. (*Weston v. Charleston*, 2 Pet. 449, 463-5; *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 31; *Pacific Gas & Electric Co. v. Police Court*, 251 U. S. 22; *Missouri v. Taylor*, 266 U. S. 200; *Michigan Central R. Co. v. Mix*, 278 U. S. 492; *California Code of Civil Procedure*, Secs. 577, 1102-1105, 1088, 1094, 52-*a*.) It is immaterial whether the lower court was exercising original or appellate jurisdiction. (*Hartman v. Greenhow*, 102 U. S. 672, and cases above cited.)

3. Whether the question of the validity of the state statute under the Federal Constitution was properly raised in the lower court by petition for writ of prohibition, ordinarily is a question of state practice, and if the federal right asserted is expressly or necessarily passed upon and denied by the highest court of the state in which a decision in the suit could be had, this court has jurisdiction to review the judgment of the state court. (*North Carolina R. Co. v. Zachary*, 232 U. S. 248; *Hill v. Smith*, 260 U. S. 592; *Chicago etc. Co. v. Perry*, 259 U. S. 548.)

In this case, on account of the Federal Questions of whether the statute under which the suit in the Superior Court was brought, is void under the "due process" and "equal protection" clauses of the Fourteenth Amendment for lack of an ascertainable or sufficiently definite standard of conduct, and for the various other reasons asserted, the jurisdiction of the court involves such Federal Questions, and is dependent on their determination. (See cases, *post*.)

Where the state court deems the federal question before it, actually entertains it, and decides it adversely to the federal right asserted, the United States Supreme Court has jurisdiction. (*Rogers v. Hennepin County,* 240 U. S. 184.)

The lower court having impliedly held that prohibition is the proper remedy, the question of constitutionality of the statute involved and of the order of the Superior Court applying such statute to appellants by proceeding, without questioning the procedure, to decide the federal question of whether the statute is repugnant to the due process clause of the Federal Constitution for lack of an ascertainable or sufficiently definite standard or measure of what is prohibited by inhibition against "the unreasonable waste of natural gas" [R. 336-357], and also the federal question of whether the statute as applied to appellants operates to take appellants' property for a public use without compensation and without due process of law in violation of the Fourteenth Amendment [R. 357-361], the issue of whether these federal questions were properly raised by writ of prohibition proceedings is not open to question in this court. (*North Carolina R. Co. v. Zachary,* 232 U. S. 247, 257; *Home Ins. Co. v. Dick,* 281 U. S. 397, 401; *Hill v. Smith,* 260 U. S. 592, 594; *Rogers v. Hennepin,* 240 U. S. 184, 188.) A non-federal ground (if such it were) which might have been considered by the state court but was not, is of no consequence and cannot be raised in this court to defeat its jurisdiction. (*Grayson v. Harris,* 267 U. S. 352-358.)

4. In truth, the lower court was correct in assuming that prohibition is appellants' proper remedy. Many Cali-

fornia decisions establish the rule that *a court which is proceeding in violation of the express or implied mandate of a constitution or statute, or which grants to or takes away from a party rights which a constitution or statute expressly or impliedly provides shall not be granted or taken away, is exceeding its jurisdiction, even though it otherwise has jurisdiction of the subject matter and the parties, and prohibition is the proper remedy.* Such action constitutes more than mere error in the exercise of jurisdiction, for, under the authorities, the court thereby exceeds its jurisdiction. (*Jacobsen v. Superior Court,* 192 Cal. 319, 330-2; *Baar v. Smith,* 201 Cal. 87, 100-102; *McClatchy v. Superior Court,* 119 Cal. 413, 420; *Tonningsen v. Odd Fellows' Cem. Assn.,* 60 Cal. App. 568; *Weintraub v. Superior Court,* 91 Cal. App. 763; *Ambassador Petroleum Co. v. Superior Court,* 208 Cal. 667, 671; *Long v. Superior Court,* 102 Cal. 449, 453, 455.) Many other cases might be cited. In the second and last of these cases the trial court granted "too much" relief. The *Jacobsen* case involved a *preliminary injunction* in a suit in equity over which the court had jurisdiction of the parties and the subject matter, but same was held to be in excess of its jurisdiction and not mere error, in that it deprived the defendant of his property for public use without just compensation and without due process of law. The similarity of this case is great; the case is almost on all fours. The court also held that the remedy by appeal or *supersedeas* under facts (192 Cal. 330) almost identical to those alleged in the case at bar [R. 25-27] did not afford a plain, speedy or adequate remedy. (192 Cal. 330.)

5. The granting of a writ of prohibition to a party injuriously affected bringing himself clearly within the law is not discretionary with the court in California, but is a matter of right *ex debito justitiae.* (*Havemeyer v. Superior Court,* 84 Cal. 327, 401.)

6. That the federal questions involved were properly raised by a writ of prohibition is also in accord with the previous decisions of this court (*Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co.,* 240 U. S. 30, 31-32), where this court refused to dismiss a writ of error from a judgment of the highest court of Alabama denying a writ of prohibition involving a state statute authorizing condemnation proceedings which it was alleged contravened the Fourteenth Amendment in that the purpose of the condemnation was not a public one. (See, also: *Missouri v. Taylor,* 266 U. S. 200; *Pacific Gas & Electric Co. v. Police Court,* 251 U. S. 22; *Weston v. Charleston,* 2 Pet. 449; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 234-236; *Napa Valley Electric Co. v. Railroad Commission,* 251 U. S. 366; *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 65; *Ex parte Yarbrough,* 110 U. S. 651.)

The Fourteenth Amendment and the other provisions of the Federal Constitution invoked by appellants are directed to state action by its legislative, executive or *judicial* branches. (*Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673; *Home Teleph. & Teleg. Co. v. Los Angeles,* 227 U. S. 278; *Scott v. McNeal,* 154 U. S. 34; *Ex parte Virginia,* 100 U. S. 339, 346-347.) These constitutional provisions not only grant rights to the parties litigant which it is the *duty* of state courts to enforce, but are directed to state action through its judicial branch,

the mandate of which that branch has no *power* to ignore. (See above California and federal citations.) To hold otherwise would put the state court above the Federal Constitution. No state can give to its courts power to violate the Federal Constitution. (*Pennsylvania R. Co. v. Public Service Commission*, 250 U. S. 566.) This prohibition against judicial action by a state court is even stronger than when imposed by a state statute or constitution. Under the decisions above cited it makes no difference if the state court be sitting as a court of equity, or if the order in violation of the mandate of the Federal Constitution be a preliminary injunction. (*Jacobsen v. Superior Court, supra.*) In fact, the sole authority of the Superior Court was derived from the statute. [R. 363, p. 22 of Supplement to Appellees' Brief.]

The preliminary injunction invading appellants' asserted federal rights was just as disastrous as, and for all practical purposes is, a final injunction. "The substance and not the shadow determines the validity of the exercise of the power." (*Postal Tel. etc. Co. v. Adams*, 155 U. S. 689, 698, 39 L. Ed. 311, 316.) Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments; there must be jurisdiction to give the judgment rendered, as well as to hear and determine the case. A state court has no power to enforce an unconstitutional statute or to render or enforce a judgment in violation of the Constitution under the admitted facts. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert judicial action into

due process of law if the necessary result be to deprive him of his property without compensation.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-236;

Windsor v. McVeigh, 93 U. S. 274, 282;

Ex parte Reed, 100 U. S. 13;

Jacobsen v. Superior Court, 192 Cal. 319, and other cases above cited, and cases therein referred to.

7. Since, therefore, the lower court not only correctly assumed that the federal questions hereinafter discussed were properly before it for decision, and actually decided them, but also since such federal questions presented on this appeal were necessarily involved, and were controlling in its decision, this court's jurisdiction is complete. (*Grubb v. Public Utilities Commission,* 281 U. S. 470, 477-8; *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63; and cases above cited.) The lower court, in reaching its decision that the Superior Court had "jurisdiction to determine what is an unreasonable waste" of natural gas, actually decided, and also had to decide, (a) the federal question presented on this appeal, whether the statutory prohibition against "unreasonable waste of natural gas" is uncertain and devoid of a sufficient standard or measure of the conduct to satisfy the due process clause of the Fourteenth Amendment; and (b) the other federal questions presented on this appeal, *viz.:* whether under the admitted facts presented in the petition for writ of prohibition the statute, particularly as construed and applied and sought to be enforced against appellants, is in conflict with specific clauses of the Federal Constitution and whether the lower court properly denied the rights asserted by appellants thereunder.

Appellants are therefore entitled to have the federal questions presented decided by this court on their merits.

8. "When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court." (*Coppage v. Kansas*, 236 U. S. 1, 14-15, 59 L. Ed. 441, 446; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 63 L. Ed. 689; *Louisianan R. & Nav. Co. v. Behrman*, 235 U. S. 164, 171, 59 L. Ed. 175.) In the case last cited this court said that in determining what effect has been given to a statute

> "This court is not limited to the mere consideration of the language of the opinion of the state court" (p. 171).

9. A decision of the highest court of the state against the contention that the operation of the state statute involved as construed and applied to an appellant is to deprive him of his property without due process of law, involves a federal question properly raised by appeal rather than by *certiorari*. (*Darling v. Newport News*, 249 U. S. 540, 63 L. Ed. 79; *Merchants Nat'l Bank v. Richmond*, 256 U. S. 635, 65 L. Ed. 1135.) This is also true if the necessary effect of the judgment is to deny a federal right claimed, even though the ruling be not put upon that ground.

> *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, 73 L. Ed. 184, 187.

10. This court on writ of error to or appeal from the state court, in a case where the issue is whether a state statute

in its application to facts which are set out in the pleadings and are admitted by the demurrer violates the Constitution, must examine and analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the highest state court in this regard.

Truax v. Corrigan, 257 U. S. 312, 324-325, and cases there cited;

Merchants National bank v. Richmond, 256 U. S. 635, 638.

11. It is also the duty of this court on appeal or writ of error proceedings to a state court to inquire into the facts where such inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution (*Beidler v. South Carolina Tax Commission*, Advance Opinions, Case No. 2, Oct. Term 1930, 75 L. Ed. 69, 70, and cases there cited), or where it is claimed that a federal right set up has been wrongly denied and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact, or when the conclusion of law and findings of fact are so intermingled as to make such inquiry necessary, in order to pass upon the federal question involved (*Truax v. Corrigan, supra*), or where there is ground for the insistence that a federal right has been denied as the result of a finding that is without support in the evidence. (*Union Pacific R. Co. v. Public Service Commission*, 248 U. S. 67, 69; *Interstate Amusement Co. v. Albert*, 239 U. S. 560.) When the basis of facts upon which the state court rests its decision denying the asserted federal right has no support in the record, it is the duty of this court to review and correct the error. (*Postal Tel. Cable Co. v. Newport*, 247 U. S.

464; *Ancient Egyptian Arabic Order v. Michaux*, 279 U. S. 737, 745-746.)

12. Legislation not limited to the regulation of private correlative rights in a common source of supply of oil or gas by preventing waste or other conduct by one or more of them which injuriously affects the correlative rights of others in the common source of supply but which is directed to the curtailment of production itself or to commercial conservation for the benefit of the consuming general public, is repugnant to the "due process" clause of the Fourteenth Amendment. (*Ohio Oil Company v. Indiana*, 177 U. S. 190; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73-77; *West v. Kansas Nat. Gas Co.*, 221 U. S. 229, 246; *Bacon v. Walker*, 204 U. S. 311; *Walls v. Midland Carbon Co.*, 254 U. S. 300.)

(See analysis of these cases under Point C of Appellants' Brief in Opposition to Motion to Dismiss or Affirm.)

The denial by this court of *certiorari*, in the two cases cited at page 30 of "Appellees Brief on Motion to Dismiss or Affirm," imports no opinion by this court on the merits of the case (*U. S. v. Carver*, 260 U. S. 482) and does not give either case the character of a precedent (*Hamilton Brown Shoe Co. v. Wolff Bros. & Co.*, 240 U. S. 482). Besides those cases are readily distinguishable.

The Kansas case involved a city ordinance limiting the number of oil wells in a city block and was sustained on account of the danger of fire, noise and other injuries to adjoining property. The city might have prohibited all oil wells within the city limits.

The Texas case was a suit against members of the Railroad Commission personally for damages arising out of an order limiting the number of oil wells on a long narrow strip under circumstances when more wells would injuriously affect the right of adjoining owners. It was held that the members of the commission were not personally liable.

13. This being the extent of the state's legislative power, if the statute goes further than is required for this purpose, and attempts through its legislative or judicial branch to deprive all the surface owners or one or more of them of the use and enjoyment of their property or to prohibit conduct by one or more owners or operators not injurious to the rights of other owners or operators in the same field,—it exceeds the limits of the state's power of regulation, and goes "too far," and it constitutes a "taking" of private property in violation of the due process clause of the Fourteenth Amendment (*West v. Kansas Natural Gas Co., supra; Penn. Coal Co. v. Mahon,* 260 U. S. 393, 413-416; *Buchanan v. Warley,* 245 U. S. 60; *Minnesota v. Barber,* 136 U. S. 313; *Herminghaus v. So. Cal. Edison Co.,* 200 Cal. 81, 107, 112, 115-118—on certiorari, 274 U. S. 728, 275 U. S. 486-487; *Hathorn v. Natural Carbonic Gas Co.,* 194 N. Y. 326; *Ex parte Kelso,* 147 Cal. 609.)

14. Neither the oil nor the gas produced in Santa Fe Springs field has been dedicated to a public use. If any such gas had been furnished to a public utility, this would not make the producer a public utility (*Allen v. Railroad Com.,* 179 Cal. 68; *Marin County v. Town of Sausalito,* 168 Cal. 587; *Associated Pipe Line Co. v. Railroad Com.,*

176 Cal. 518; *Beasley v. Engstrom,* 31 Idaho 14, 16 Pac. 1145.) But appellants have not supplied any such utility with gas. [R. 161.] Moreover, *the business of producing oil or gas is not affected with a public interest (Williams v. Standard Oil Co.,* 278 U. S. 235. 240; *Tyson & Bro. v. Banton,* 273 U. S. 418.) In the *Tyson* case the court said:

> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business." (273 U. S. 430.)

15. These cases also show that the legislative declaration of the public interest such as is found in sections 8b and 21a of the statute here involved is not sufficient and cannot authorize the invasion of private rights. (See, also, *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79, 80; *Herminghaus v. So. Cal. Edison Co.,* 200 Cal. 81, 115; *San Bernardino v. Riverside,* 186 Cal. 7.)

16. An analysis of the cases shows that the public interest in the privately owned natural resources of the state is limited to a proper regulation of the private correlative rights of owners in a common source of supply by preventing actual waste or other conduct by any one or more of them injuriously affecting the rights of other surface owners in the common source of supply. Mr. Chief Justice Hughes is evidently of this view for he is quoted in the report of the Federal Oil Conservation Board of May 27, 1926, at page 12, as giving the following legal opinion to the American Petroleum Institute:

"It has already been pointed out to the board that the Legislatures of oil-producing states have enacted various laws of a regulatory sort intended to prevent waste. *It would not be safe, however, to infer that laws which were not appropriately designed to prevent improper methods in extracting the oil, or to protect the interest of proprietors drawing from a common reservoir so that the action of one should not work a deprivation of the rights of others, but were directed to the prevention or curtailment of production itself, would be sustained in the absence of compensation to the owner who was thus deprived of the use of this property.*"

As stated by this court in *West v. Kansas Natural Gas Co., supra:*

"* * * The natural resources of a state may be other than natural gas; for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power which otherwise it would not possess. * * *

"We have reviewed the cases at some length, as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve * * * the resources of the state, and that the statute finds no justification in such purpose for its interference with private property * * *." (221 U. S. 229, 252, 260.)

17. Applying these principles to the *admitted and undisputed facts of the case at bar,* there can be no doubt but that the statute as construed and applied to appellants constitutes a taking of appellants' property for a public use without compensation, and a taking without due process of law, in violation of the Fourteenth

Amendment. It appears from these admitted facts that each of appellants' oil wells is operated with the utmost efficiency and at their optimum gas-oil ratio [R. 8], which is amongst the lowest in the field, and is also "so operated that it does not injuriously affect the operations of others owning and/or operating wells in the field" [R. 13]; also that appellants are not taking an undue or unjust proportion of oil or gas from the field. [R. 155, 6 par. 4.] It further appears that the sole purpose of the order made under the supposed authority of the statute, decreasing by over 50% the allowed gas production required by appellants in the efficient production of oil and gas as aforesaid, is *"to conserve such gas for the benefit of the general consuming public" for light, heat and fuel.* [R. 23.]

18. The majority rule prevails in California that oil and gas in place are minerals and realty and belong to the owner of the land as long as they are on it or in it or subject to his control. The same can be sold or reserved in place by the owner, and instruments of sale thereof in place are required to be executed with the formalities of a conveyance of real estate and create a corporeal rather than an incorporeal interest and sever the mineral estate from the surface estate (*Isom v. Rex Crude Oil Co.*, 147 Cal. 659; *Graciosa Oil Co. v. Santa Barbara,* 155 Cal. 140; *Duvall v. White,* 46 Cal. App. 305; *Brookshire Oil Co. v. Casmalia etc. Co.,* 156 Cal. 211; *Chandler v. Hart,* 161 Cal. 405, 412-413, 418; *Barlow v. Security Trust & Savings Bank,* 197 Cal. 263, 267; *Payne v. Neuval,* 155 Cal. 46; *Boone v. Kingsbury,* 77 Cal. Dec. 94; *Mills & Willingham, "The Law of Oil and Gas",* 1926 Ed., pp. 20,

22; 1 *Thornton's Law of Oil and Gas,* par. 25a, p. 95; *Texas Co. v. Daugherty,* 107 Tex. 234, 176 S. W. 717, 719-721; *Bodcaw Lumber Co. v. Goode* (Ark.), 254 S. W. 345, 29 A. L. R. 578; *Osborn v. Arkansas Oil & Gas Co.,* 103 Ark. 175 Annotated Note, 29 A. L. R. 586-589).

Since the drainage area of an oil well in Santa Fe Springs field is not more than 50 to 100 feet around the well [R. 6, par. 4, 153, 281] and generally in California the drainage area does not exceed more than 4 or 5 acres (*Chandler v. Hart,* 161 Cal. 405, 418), it makes very little difference whether the title of the surface owner in oil and gas *in situ* beneath his land is absolute or qualified, or is owned by him and his surrounding neighbors jointly, or whether all of the oil and gas deposits in the field are collectively owned by all of the surface owners,—the practical result is the same, for in no event can the private owners thereof be deprived thereof for the purpose of conserving the same for the benefit of the general public. It was said by this court in the *Ohio Oil Co.* case and the *West* case that "the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property" (221 U. S. 229, 254). (*Buchanan v. Warley,* 245 U. S. 60, 74; *Penn. Coal Co. v. Mahon,* 260 U. S. 393, 414; *Pumpelly v. Green Bay Company,* 80 U. S. 166; *Cleveland, C. C. & St. L. R. Co. v. Backus,* 154 U. S. 439; *Branson v. Bush,* 251 U. S. 182; *Terrace v. Thompson,* 263 U. S. 197.)

Under the admitted facts, and under the decisions of this court hereinabove cited, the statute as applied to appellants constitutes a taking of appellants' property

for a public use without compensation and without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

> "* * * when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis South Western R. Co. v. Arkansas, 235 U. S. 350, 362." (*Coppage v. Kansas*, 236 U. S. 1, 15.)

19. The extent of the invasion of appellants' property rights is so great, so arbitrary, so oppressive and unreasonable, that it goes too far under the police power of the state. Under the admitted facts, the natural gas of which appellants are sought to be deprived by the statute as construed and applied to them, cannot constitutionally be said to be wasted, much less unreasonably wasted. Private property cannot be taken or the owner deprived of the use thereof by mere legislative fiat declaring that to be waste or unreasonable waste which is not such in truth, or because it may be more beneficially used by others having no property rights therein. (*Coppage v. Kansas*, 236 U. S. 1, 16; *Hermingshaus v. Southern California Edison Co.*, 200 Cal. 81; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393.) The admitted facts show that the natural gas being produced by appellants is utilized efficiently in the useful and nowise harmful production of oil at a reasonable gas-oil ratio for each well and also for the field [R. 8-9, 13]; that appel-

lants' operations are not injuriously affecting the rights of other owners or operators in the field [R. 13, 6 par. 4, 126-7], and do not result in an undue or disproportionate taking of oil or gas by appellants [R. 6, 155]; that the gas so produced by appellants is utilized a second time, in the manufacture of casinghead gasoline [R. 12]; that so much of the remaining residual dry gas as can be used by appellants for field and other purposes is so used, and so much as can be sold is sold [R. 12]. The remainder admittedly cannot be sold or given away, and has no value [R. 12]. It cannot be stored except at exorbitant and prohibitive cost. Having been already utilized over and over again, and having no further use or value, it is necessarily permitted to escape into the air [R. 12-13]. Such remaining residual dry gas as is thus blown to the air, having been reduced to possession in the pipes of appellants and later in its casinghead gasoline plant, is, at the time of its release from the casinghead gasoline plant, the absolute private property of appellants, the same as any other article of commerce. (*West v. Kansas Nat. Gas Co.*, 221 U. S. 229, 255.) To permit the state to deprive appellants of the right to the use thereof under these circumstances and for such highly beneficial purposes as aforesaid, admittedly under conditions not injuriously affecting the rights of other owners or operators in the field, or solely for the purpose of conserving the same in the ground for the general consuming public having no property rights in the field, certainly goes too far under the police power and requires the exercise of the power of eminent domain, with just compensation. (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393; *Dobbins v. Los Angeles*, 195 U. S. 223; *Lawton v. Steele*, 152 U. S. 133-137;

Buchanan v. Warley, 245 U. S. 60; *Coppage v. Kansas,* 236 U. S. 1; *Herminghaus v. Southern California Edison Co.,* 200 Cal. 81; *Ex parte Kelso,* 147 Cal. 609.)

Considering the lack of, or insignificant, value of the residual remaining dry gas, to make the same the basis of the drastic curtailment of appellants' gas production resulting in a daily loss of $12,500.00 in oil and $3,000.00 in casinghead gasoline, to say nothing of permanent and irreparable injury to wells curtailed, shut in or killed, is certainly to "let the tail wag the dog." (*Foster Fountain Packing Co. v. Haydel,* 278 U. S. 1, 8-9.)

20. The statute involved is void for uncertainty and lack of a sufficiently definite standard of conduct under the due process clause of the Fourteenth Amendment. The cases thoroughly establish that where, as in the case at bar, there is no common law or other background defining by judicial decisions the thing prohibited, and the words used in a statute have not obtained a definite meaning through custom and usage, and where the thing prohibited is new and complex, and does not relate to matters in the every-day life of the average man, the statute is void, because it lacks "due process," in the absence of a definite and certain guide or standard of conduct so that those who are called upon to obey it may know with certainty in advance of court action what is prohibited and what is permitted. Also, because such a statute permits the exercise of arbitrary and discriminatory powers, it violates the "equal protection" clause of the Fourteenth Amendment. *Cline v. Frink Dairy Co.,* 274 U. S. 445 (distinguishing types of cases cited by appellees); *United States v. Cohen Grocery Co.,* 255 U. S. 81 (distinguishing cases); *Small*

Co. v. American Sugar Refining Co., 267 U. S. 233; *Connally v. General Construction Co.*, 269 U. S. 385; *International Harvester Co. v. Kentucky*, 234 U. S. 216; *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *United States v. Reese*, 92 U. S. 214; *Yick Wo v. Hopkins*, 118 U. S. 356; *Weed & Co. v. Lockwood*, 255 U. S. 104; *United States v. Brewer*, 139 U. S. 278. See also: *Ex parte McNulty*, 77 Cal. 164; *Hewitt v. Board of Medical Examiners*, 148 Cal. 590; *In re Clarence Lockett*, 179 Cal. 581; *People v. Pace*, 73 Cal. App. 548; *In re Peppers*, 189 Cal. 682; *United States v. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68; *Chicago N. W. R. R. Co. v. Dey*, 35 Fed. 866 (leading case, opinion by J. Brewer); *Tozer v. United States*, 52 Fed. 917 (a leading case); *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 135; *Standard Chem. & Metals Corp. v. Waugh Chem. Co.*, 231 N. Y. 51, 131 N. E. 566; *Detroit Creamery Co. v. Kinnane* (Mich.), 264 Fed. 845; *United States v. Bernstein*, 267 Fed. 295; *Cook v. State*, 26 Ind. App. 278, 59 N. E. 489; *In re Schmolke*, 199 Cal. 42; *State v. Board of Canvassers*, 159 Wis. 216, 150 N. W. 542; *In re Toyu Kee*, 12 Haw. 164; *State v. Diamond*, 27 N. M. 477, 20 A. L. R. 1527; *Xenia v. Schmidt*, 101 Ohio St. 437, 130 N. E. 24; *Commonwealth v. Maletsky*, 203 Mass. 241; *Anderson v. Manchester Fire Assn.*, 59 Minn. 182, 60 N. W. 1095; *Dowling v. Lankershire Ins. Co.*, 92 Wisc. 63, 65 N. W. 738; *United States v. Sharp*, Fed. Cas. 16,264, 27 Fed. Cas. 1041.

That the rule applies to civil, as well as criminal, statutes, see: *Cline v. Frink Dairy Co.*, 274 U. S. 445, 463; *Small v. American Sugar Refining Co.*, 267 U. S. 233;

Standard Chem. etc. Corp. v. Waugh, 231 N. Y. 51, 131 N. E. 566; *Hewitt v. Board of Medical Examiners*, 148 Cal. 590.

21. The so-called "rule of reason" does not afford a valid statutory standard of conduct under the Fourteenth Amendment. The word *"reasonable"* (even if not used with "waste," which is equally uncertain and vague) is uniformly held not to be a sufficiently definite standard of conduct, except where used in connection with a subject having a judicially determined or common law meaning, as in the restraint of trade cases and the later reasonable rate cases, or where used in reference to a simple subject, as in the speed cases,—where a person of ordinary intelligence from common and everyday experience is familiar with what is reasonable.

Cline v. Frink Dairy Company, 274 U. S. 445, ("reasonable profit" in Anti-trust Act. The court distinguishes the speed cases, and other types of cases).

United States v. Cohen Grocery Co., 225 U. S. 81, ("unjust or unreasonable rate of charge" in handling or dealing in or with any necessities of life—distinguishing other types of cases).

International Harvester Co. v. Kentucky, 234 U. S. 216, 232-233, ("market value under fair competition, and under normal market conditions").

United States v. Pennsylvania R. Co., 242 U. S. 208, (furnishing tank-cars "upon reasonable request and reasonable notice").

Tozer v. United States, 52 Fed. 917 (opinion by J. Brewer—prohibiting undue and unreasonable preferences and advantages between shippers).

Louisville etc. R. R. Co. v. Commonwealth, 99 Ky. 132, 35 S. W. 129, (prohibiting from charging "more than a reasonable or just rate").

Schaezlein v. Cabaniss, 135 Cal. 466, (requiring the sanitary condition of the workshop or factory "to be reasonably good").

In re Williams, 74 Cal. App. 331 ("reasonable number of teachers" in public dance halls).

See also other cases above cited involving standards not nearly so uncertain and complex as the statute here involved.

22. The rule that the construction of a state statute by the highest court of the state is accepted by this court, does not apply when the state construction is conflicting, uncertain or unsettled. In such a case this court will construe the statute for itself. (*Concordia Ins. Co. v. Bryan*, Case No. 278, Oct. Term 1930, 75 L. Ed. 387, 391; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458; *Portneuf-Marsh Valley Canal Co. v. Brown*, 274 U. S. 630; *Burgess v. Seligman*, 107 U. S. 20.) The construction of the statute as involved in the three opinions by the highest courts of the state is so conflicting and uncertain that this court should adopt its own view as to the standard or measure of unreasonable waste of gas prohibited [R. 333; see analysis and comparison of opinions under point *G* of appellants' brief in opposition to dismiss or affirm accompanying this statement.]

23. The total invalidity under the United States Constitution of section 8d of the statute, upon which the state construction is based [R. 350-2, Appendix B], renders the state construction without merit and also re-

quires this court to adopt its own view of the statute. Section 8d on its face is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. It provides that at the conclusion of the hearing and proceedings before the supervisor of oil and gas therein provided for, he shall make an order, and expressly authorizes the supervisor, even though an unreasonable waste of natural gas is found to exist, to order the discontinuance thereof only "to the extent stated in said order." This gives absolute, arbitrary, unguided and uncontrolled discretion and power to the supervisor to punish his enemies and favor his friends, which is condemned under the Federal Constitution. (*Yick Wo v. Hopkins*, 118 U. S. 356.)

Since this invalid provision of section 8d refers to the order to be made at the conclusion of the hearing therein provided for, with which alone the section deals, the entire section is invalid, even though the statute provides that the invalidity of any provision shall not affect the remaining provisions. (*Williams v. Standard Oil Co.*, 278 U. S. 235.)

24. So, even if the state construction of the statute were not conflicting, uncertain and in doubt, it is inseparably bound up with and interwoven with the Federal questions as to the validity of the statute sought to be invoked against appellants, and this court has jurisdiction, therefore, to inquire into the matter (*Abie State Bank v. Bryan*, Case No. 63, Oct. Term 1930, 75 L. Ed. 420, 424.)

25. In any event, this court should itself consider whether the construction of the statute is not wholly lacking in

merit, in order that it may determine the federal questions and federal rights presented. (*Terre Haute & I. R. Co. v. Indiana ex rel. Ketcham,* 194 U. S. 579; *Ward v. Love County,* 253 U. S. 17; *Baltimore & Ohio R. R. Co. v. Maryland,* 87 U. S. (20 Wall.) 643; *Klinger v. Missouri,* 80 U. S. (13 Wall) 257.) In the first of these cases the state court's decision was based upon an *untenable construction by the statement.*

26. Furthermore, even where this court is bound by a well settled and certain construction by the state courts of a state statute, it is not precluded by their reasoning, but must exercise an independent judgment when called upon to determine the federal question whether the statute as so construed is void for uncertainty under the Fourteenth Amendment and the federal question whether the act as construed and applied to the concrete facts of this case is repugnant to the clauses of the Federal Constitution relied upon by appellants. So whether this court adopts its own view or follows the construction adopted by the lower court or follows the latest decision by the Supreme Court of California, the statute is void for lack of a sufficient standard or measure of what constitutes "unreasonable waste of natural gas" to satisfy the due process clause of the Fourteenth Amendment.

(See argument under point *G* of appellants' brief in opposition to motion to dismiss or affirm.)

27. Since, "Reasoning does not lead back from the occurrence to its cause," to make the occurrence of the escape of natural gas *prima facie* evidence of unreasonable waste is arbitrary, and violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

(*Western & A. R. Co. v. Henderson,* 279 U. S. 639; *Manley v. Georgia,* 279 U. S. 1; *In re Opinion of Justices,* 208 Mass. 619, 94 N. E. 1044; *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79; *Adams v. New York,* 192 U. S. 585; *Re Peterson,* 253 U. S. 300; *State v. Boswick,* 13 R. I. 211; *Bailey v. Alabama,* 219 U. S. 219.)

Manley v. Georgia, supra, is closely in point.

This court there said:

> "* * * A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Bailey v. Alabama, 219 U. S. 219, 233, *et seq.,* 55 L. ed. 191, 198, 31 Sup. Ct. Rep. 145. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. * * *" (279 U. S. 1, 6.)

> "* * * The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms 'fraudulent' and 'fraud,' contrasted with 'fairly,' 'legally,' 'honestly,' and 'in accordance with law,' when used to describe the management of a bank. Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 Sup. Ct. Rep. 126; Cline v. Frink Dairy Co., 274 U. S. 445, 454, 71 L. ed. 1146, 1151, 47 Sup. Ct. Rep. 681.

In California the presumption attempted to be created by the statute does not merely create a temporary inference of fact that vanishes upon the introduction of opposing evidence but, as stated by this court in the *Western & A. R. Co. v. Henderson case, supra,* it "creates an inference

that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate" (279 U. S. 639, 644). Section 1833 of the Code of Civil Procedure of California provides: "*Prima facie* evidence is that which suffices for the proof of a particular fact, *until contradicted and overcome by other evidence.*" Section 1961 of the said code provides: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but *unless so controverted the jury are bound to find according to the presumption.*"

28. The statute involved as applied to appellants unconstitutionally impairs appellants' lease contracts. (*Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393; *Cooley's Constitutional Limitations,* 8th Ed., Vol. I, p. 583; *Maverick Oil Co. v. Powell,* 237 U. S. 40; *Swiss Oil Corp. v. Powell,* 199 Ky. 863, 251 S. W. 1007.) (See *Point I* of appellants' brief in opposition to Motion to Dismiss or Affirm.)

29. The statute denies to appellants the equal protection of the laws in a number of particulars. *Truax v. Corrigan,* 257 U. S. 312, 337; *Cotting v. Godard,* 183 U. S. 79; *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79; *Hayes v. Missouri,* 120 U. S. 68; *Yick Wo v. Hopkins,* 118 U. S. 356, 366-7. (See argument and references to the record under *Point J* of appellants' Brief in Opposition to Motions to Dismiss or Affirm.)

30. If one or more of the federal questions raised on the appeal are such that, standing alone, they could be raised only upon certiorari, this court nevertheless has jurisdiction on the appeal to determine same, if the court finds

that the record has been properly brought here upon appeal, because involving the constitutionality of the state statute. (*Prudential Ins. Co. v. Cheek,* 259 U. S. 530, 547.)

If, by any possibility, it can be that appeal was improvidently sought and allowed, then, treating the papers whereon the appeal was allowed as a petition for certiorari, the judgment should be reviewed on certiorari. We sincerely believe that the appeal was properly allowed, and that this court's jurisdiction attaches under section 237*a* U. S. Judicial Code, in that it seeks to review a final judgment in a suit in the highest court in a state in which the decision could be had, where is drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Respectfully submitted,

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Appendix A.

An act to protect the natural resources of petroleum and gas from waste and destruction; relating to the creation of a division in the department of natural resources for the prevention of such waste and destruction; providing for the appointment of a state oil and gas supervisor; prescribing his duties and powers; fixing his compensation; providing for the appointment of deputies and employees; providing for their duties and compensation; providing for the inspection of petroleum and gas wells; requiring all persons operating petroleum and gas wells to make certain reports; permitting and authorizing agreements in the interests of conservation; providing for suits by the director of the department of natural resources in the name of the people of the State of California; providing procedure for arbitration of departmental rulings; creating a fund for the purposes of the act; providing for assessment of charges to be paid by operators and providing for the collection thereof; and making an appropriation for the purposes of this act.

[Approved June 10, 1915; Ch. 718, amended 1917; Ch. 759, amended 1919; Ch. 536, amended 1921; Ch. 912, amended 1929; Ch. 535.]

The people of the State of California do enact as follows:

Section 1. The division of the department of natural resources now or hereafter created for the supervision of petroleum and gas shall be in charge of a chief to be known as "state oil and gas supervisor." [Stats. 1929, p. 925.]

Sec. 3. It shall be the duty of the state oil and gas supervisor so to supervise the drilling, operation and maintenance and abandonment of petroleum or gas wells in the State of California, as to prevent, as far as possible, damage to underground petroleum and gas deposits from infiltrating water and other causes and loss of petroleum and natural gas. It shall be the duty of any person, firm or corporation engaged in operating any petroleum or gas well in this state wherein high pressure gas is known to exist, and any person, firm or corporation drilling for petroleum or gas in any district in this state where the pressure of petroleum or gas is unknown, to equip any such well with casing of sufficient strength, and such other safety devices as may be necessary, in accordance with methods approved by the state oil and gas supervisor, and to use every effort and endeavor to effectually prevent blow-outs, explosions and fires. [Stats. 1929, p. 925.]

Sec. 8. It shall be the duty of the supervisor to order such tests or remedial work as in his judgment are necessary to protect the petroleum and gas deposits from damage by underground water, or to prevent the escape of water into underground formations, to the best interests of the neighboring property owners, and the public at large. The order shall be in written form, signed by the supervisor, and shall be served upon the owner of the well, or the local agent appointed by such owner, either personally or by mailing a copy of said order to the post-office address given at the time the local agent is designated, or if no such local agent has been designated, by mailing a copy of said order to the last known post-office address of said owner, or if the owner be unknown

by posting a copy of said order in a conspicious place upon the property, and publishing the same in some newspaper of general circulation throughout the county in which said well is located, once a week for two successive weeks. Said order shall specify the conditions sought to be remedied and the work necessary to protect such deposits from damage from underground water.

Whenever the supervisor or any deputy makes or gives any written direction concerning the drilling, testing or other operations in any oil or gas well drilled, in process of drilling or being abandoned, and the operator, owner or representative of either, serves written notice either personally or by mail, addressed to the supervisor or his deputy at his office in the district, requesting that a definite order be made upon such subject, the supervisor or his deputies shall, within five days after such notice, deliver a final written order on such subject matter in such manner and form that an appeal may be taken at once therefrom, to the board of oil and gas commissioners of the district created under this chapter. [Stats. 1929, p. 926.]

Sec. 8*b*. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste. [Stats. 1929, p. 927.]

Sec. 8*c*. Whenever the state oil and gas supervisor shall find that it is in the interest of the protection of

oil or gas from unreasonable waste, it is declared to be lawful for the lessor, lessee, operator or other persons, firms and corporations owning or controlling royalty or other interests in the separate properties of the same producing or prospective oil or gas field, to enter, with the approval of the state oil and gas supervisor, into agreements for the purpose of bringing about the cooperative development and operation of all or a part or parts of such field, or for the purpose of bringing about the development or operation of all or a part or parts of such field as a unit, or for the purpose of fixing the time, location and manner of drilling and operating of wells for the production of oil or gas, or providing for the return of natural gas into the sub-surface of the earth for the purpose of storage or the repressuring of an oil or gas field. Any such agreement shall bind the successors and assigns of the parties thereto in the land affected thereby and shall be enforceable in an action for specific performance. [Stats. 1929, p. 927.]

Sec. 8*d*. Upon complaint being made to the director of natural resources by any person operating in any oil field that there is occurring or threatened an unreasonable waste of gas in any field or fields and a petition is filed with said director requesting that a hearing be held to consider whether such waste is occurring or threatened, and it appearing to the director of natural resources that there is probable cause for such complaint, he shall order the state oil and gas supervisor to hold such a hearing and to fix a time and place therefor; such a hearing may also be ordered by the said director on the application of the state oil and gas supervisor. Notice of the time and place

of said hearing shall be given by publication in a newspaper printed and published in the county in which the unreasonable waste of gas is alleged to be taking place or to be threatened. Said notice shall also specify the commonly accepted name or a general description of the field or locality in which the unreasonable waste of gas is alleged to be taking place or to be threatened. The place of hearing shall be in the county or in any of the counties in which the unreasonable waste of gas is alleged to be taking place or to be threatened. Such publication shall be daily for five (5) days prior to the time of the hearing. The state oil and gas supervisor shall also send notice by mail to each lessor, lessee or operator of any oil and gas well in said field so far as the same may be known to him. No failure to send such written notice shall affect the validity of the proceeding. At such hearing all persons interested shall be entitled to be heard and may present testimony either oral or written. All witnesses shall be sworn and a transcript of the proceedings shall be kept by a stenographic reporter. All the provisions of this act in reference to the subpoenaing of witnesses and the taking of depositions shall be applicable to the hearing before the state oil and gas supervisor. Upon the conclusion of said hearing the state oil and gas supervisor shall determine whether or not there is an unreasonable waste of gas in said field, in existence or threatened, and shall also determine the extent to which the waste of gas therein occurring or threatened is unreasonable. If it shall appear that gas is being produced from any oil well or wells in quantities exceeding a reasonable proportion to the amount of oil produced from the same well or wells, even though it is shown that such excess gas is being used in

the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is not in excess of the amount which bears a reasonable proportion to the amount of oil produced from such other wells and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field. If the waste of gas be found unreasonable an order shall be made directing that such unreasonable waste of gas shall be discontinued or refrained from to the extent stated in said order. The sale or delivery of gas to another by a lessor, lessee or operator shall be no defense, excuse or reason for any lessor, lessee or operator disobeying an order of the state oil and gas supervisor directing the discontinuance or curtailment of the production of the well or wells from which said gas is being produced where such gas is being unreasonably wasted by such buyer or by the person to whom deliveries are being made. A copy of said order must be posted in a conspicuous place upon the property affected thereby, and said order shall become final five (5) days after such posting unless appealed from as provided in section 9 hereof. [Stats. 1929, p. 928.]

Sec. 9. The lessor, lessee, or any operator or any well owner or the owner of any rig, derrick, or other operating structure, or his or its local agent, must within five (5) days from the date of the service of any order

from the supervisor or his chief deputy or field deputy, other than the order contemplated by section 8*d* hereof, file with the supervisor or his deputy in the district where the property is located, a written statement that the order is not acceptable, and that appeal from said order is taken to the board of commissioners of said district under the provisions of this act, or comply with such order. Any lessor, lessee, or operator affected by an order made pursuant to section 8*d* hereof may, within five (5) days from the posting of the copy of such order file with the supervisor written appeal therefrom to the board of commissioners of said district under the provisions of this act. Any such appeal shall operate as a stay of any order issued under or pursuant to the provisions of this act. Immediately upon filing of such notice of appeal, the deputy supervisor of the district, as secretary ex officio of the board of oil and gas commissioners, shall call a meeting of said commissioners to hear and pass upon said appeal. No commissioner shall be disqualified from sitting or acting in any appeal from any order of the state oil and gas supervisor involving the unreasonable waste of gas by reason of the fact that he is an employee of a lessor, lessee or operator who is interested in the oil or gas field affected by such order appealed from. The hearing upon said appeal before said district board of oil and gas commissioners shall be de novo and at such place in the district as the commissioners may designate, and within ten days from the taking of such appeal five days' notice in writing shall be given to the appellant of the time and place of such hearing, and for good cause the commissioners may postpone such hearing on the application of appellant, or the state oil and gas supervisor, or

the field deputy in said district, for not exceeding five days. The board of commissioners after hearing shall affirm, set aside or modify said order as shall be determined by a majority of the whole board. The decision of said board shall forthwith be filed with the oil and gas supervisor and upon such filing shall be final. [Stats. 1929, p. 929.]

Sec. 14*a*. When the decision of the state oil and gas supervisor that there is an unreasonable waste of gas occurring or threatened, shall have become final, a certified copy thereof, or if modified by the order of the board of commissioners, then a certified copy of the order as modified, shall be filed with the director of the department of natural resources. The director, unless said order is complied with voluntarily, shall have proceedings instituted in the name of the people of the State of California to enjoin unreasonable waste of gas. Such proceedings shall be instituted in the superior court for the county in which the property where the wastage is occurring or is threatened or any part thereof may lie. There may be joined in the same proceedings any number of defendants, although their properties and interests may be severally owned and their actual or threatened unreasonable wastage of gas may be separate and distinct; *provided,* the actual or threatened unreasonable waste by all of the defendants are in or with reference to the same producing or prospective oil or gas field. In such suits no restraining order shall be issued ex parte but otherwise the procedure shall be conformable with the provisions of chapter three of title seven of part two of the Code of Civil Procedure of the State of California, and no temporary or

permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking or otherwise. In such proceedings the findings of the oil and gas supervisor, unless set aside or modified by the board of commissioners, or if so modified then except to the extent so modified, shall constitute prima facie evidence of the unreasonable wastage of gas therein found to be occurring or threatened. The judgment of the court shall be appealable by any party in the same manner as other judgments rendered under said chapter. [Stats. 1929, p. 930.]

Sec. 14*b*. Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin such unreasonable waste of gas regardless of whether proceedings have or have not been instituted under section 8 hereof, and regardless of whether an order has or has not been made therein. Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are situated. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued ex parte, but otherwise the procedure shall be governed by the pro-

visions of chapter three, title seven, part two of the Code of Civil Procedure of the State of California and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise. [Stats. 1929, p. 930.]

Sec. 17. The owner or operator of any well referred to in this act shall, before commencing the work of drilling an oil or gas well, file with the supervisor, or his local deputy, a written notice of intention to commence drilling. Such notice shall also contain the following information: (1) Statement of location and elevation above sea level of the floor of the proposed derrick and drill rig; (2) the number or other designation by which such well shall be known, which number or designation shall not be changed after filing the notice provided for in this section, without the written consent of the supervisor being obtained therefor; (3) the owner's or operator's estimate of the depth of the point at which water will be shut off, together with the method by which such shut-off is intended to be made and the size and weight of casing to be used; (4) the owner's or operator's estimate of the depth at which oil or gas producing sand or formation will be encountered.

After the completion of any well the provisions of this section shall also apply, as far as may be, to the deepening or redrilling of any well, or any operation involving the plugging of any well or any operations permanently altering in any manner the casing of any well; *and provided, further,* that the number or designation by which any well heretofore drilled has been known, shall

not be changed without first obtaining a written consent of the supervisor. [Stats. 1917, p. 1596.]

Sec. 17*a*. It shall be the duty of the owner or operator of any well referred to in this act to notify the supervisor, or his deputy, in writing, in such form as the supervisor, or his deputy, may direct, of the sale, assignment, transfer, conveyance or exchange, by such owner or operator, of such well, and the land, owned or leased, upon which the well is located, within five days after such sale, assignment, transfer, conveyance or exchange. Said notice shall contain the following: (1) the name and address of the person, firm, association, corporation, trust or syndicate to whom such well was sold, assigned, transferred, conveyed, or exchanged; (2) the name and location of such well; (3) the date of the sale, assignment, transfer, conveyance or exchange; (4) the date when possession was relinquished by the owner or operator; (5) a description of the land upon which such well is situated.

Every person, firm, association, corporation, trust or syndicate acquiring the ownership of any well referred to in this act, whether by purchase, transfer, assignment, conveyance or exchange, or otherwise, shall within five days after acquiring such well, and the land, owned or leased, upon which the well is located, notify the supervisor, or his deputy, in writing, of such ownership. Said notice shall contain the following: (1) the name and address of the person, firm, association, corporation, trust or syndicate from whom said well was acquired; (2) the name and location of said well; (3) the date of acquisition; (4) the date when possession was acquired; (5) a description of the land upon which such well is situated. [Stats. 1929, p. 932.]

Sec. 18. It shall be the duty of the owner and operator of any well referred to in this act to keep a careful and accurate log, core record and history, of the drilling of such well, such log to show the character and depth of the formation passed through or encountered in the drilling of such well, and particularly to show the location and depth of the water-bearing strata, together with the character of the water encountered from time to time (so far as ascertained) and to show at what point such water was shut off, if at all, and if not, to so state in such log, and show completely, the amounts, kinds and size of casing used, and show the depth at which oil-bearing strata are encountered, the depth and character of same and whether all water, overlying and underlying such oil-bearing strata was successfully and permanently shut off so as to prevent the percolation or penetration into such oil-bearing strata; such core record to show depth, character, and fluid content of cores obtained, so far as determined; such history to show location and amount of side-track casings, tools or other material, depth and quantity of cement in cement plugs, shots of dynamite or other explosives, results of production, and other tests during drilling operations; such logs shall be kept in the local office of the owner or operator, and, together with the tour reports of said owner or operator, shall be subject, during business hours, to the inspection of the supervisor, or any of his deputies, or any of the commissioners of the district, except in the case of a prospect well as hereafter defined. Upon the completion of any well, or upon the suspension of operations upon any well, for a period of six months, if it be a prospect well, or for thirty days, if it be in proven territory, a copy of said log, core

record and history, in duplicate, and in such form as the supervisor may direct, shall be filed within ten days after such completion, or after the expiration of said thirty day period, with the field supervisor, and a like copy shall be filed upon the completion of any additional work in the deepening of any such well. The owner or operator of any well referred to in this act, or his local agent, shall file with the supervisor a copy of such log, history, and core record, or any portion thereof, at any time after the commencement of the work of drilling any such well, except a prospect well, upon written request of the supervisor, or his deputy. Such request shall be signed by the supervisor, or his deputy, and served either personally upon, or by mailing a copy of said request, by registered mail, to the last known post-office address of such owner or operator or agent.

A well shall be deemed completed, for the purposes of this act, thirty days after the well has commenced to produce oil, water, or gas, unless drilling operations are resumed before the end of the thirty-day period.

The state oil and gas supervisor shall determine and designate what wells are prospect wells within the meaning of this act, and no reports shall be required from such prospect wells until six months after the completion thereof.

The owner or operator of any well drilled previous to the enactment of this act shall furnish to the supervisor or his deputy, a complete and correct log, in duplicate, and in such form as the supervisor may direct, or his deputy, of such well, so far as may be possible, together

with a statement of the present condition of said well. [Stats. 1929, p. 933.]

Sec. 20. It shall be the duty of every person, association or corporation producing oil in the State of California, to file with the supervisor, on or before the tenth day of each month, for the last preceding calendar month, a statement showing amount of oil and gas produced during the period indicated from each well, together with its gravity and the amount of water produced from each well, estimated in accordance with methods approved by the supervisor, and the number of days during which fluid was produced from each well, the number of wells drilling, producing or idle, owned or operated by said person, association or corporation; also what disposition was made of the gas produced from each well, including the names of persons, if any, to whom said gas was delivered, and such other information regarding gas and the disposition thereof as the state oil and gas supervisor may require; *provided,* that, upon request and satisfactory showing a longer interval may be fixed by the state oil and gas supervisor as to such reports in the case of any specific owner or operator.

This information shall be in such form as the supervisor may designate. [Stats. 1929, p. 935.]

Sec. 21. Any owner or operator of any well referred to in this act, or employee thereof, who refuses to permit the supervisor, or his deputy, or his inspector, to inspect the same, or who wilfully hinders or delays the enforcement of this act, and every person, firm, association, corporation, trust or syndicate, whether as principal, agent,

servant, employee or otherwise, violating or failing, neglecting or refusing to comply with any of the provisions of this act, or failing or neglecting or refusing to furnish any report or record which may be required pursuant to the provisions of this act, or who wilfully renders a false or fraudulent report, is guilty of a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment, for each such offense. [Stats. 1929, p. 935.]

Sec. 21*a*. The charges hereinafter provided for are directed to be levied by the State of California as necessary in the exercise of its police power and to provide a means by which to supervise and protect deposits of petroleum and gas within the State of California, in which deposits the people of the State of California are hereby declared to have a primary and supreme interest. [Stats. 1917, p. 1598.]

Sec. 22. Charges levied, assessed and collected as hereinafter provided upon the properties of every person, firm, corporation or association operating any well or wells for the production of petroleum in this state, or operating any well or wells for the production of natural gas in this state which gas wells are situate on lands situate within two miles, as near as may be, of any petroleum or gas well the production of which is chargeable under this act, shall be used exclusively for the support and maintenance of the division of the department of natural resources charged with the supervision of petroleum and gas, and shall be assessed and levied by the department

of natural resources and collected in the manner hereinafter provided. [Stats. 1929, p. 935.]

Sec. 23. Every person, firm, corporation or association operating any petroleum well or wells in this state shall annually pay a charge to the state treasurer at a uniform rate per barrel of petroleum produced for the preceding calendar year at the time and in the manner hereinafter provided, based upon a verified report as herein provided. [Stats. 1915, p. 1410.]

Sec. 24. Every person, firm, corporation or association operating any gas well or wells in this state shall annually pay a charge to the state treasurer based upon the amount of gas sold in the preceding calendar year, at a fixed rate per thousand cubic feet, at the times and in the manner hereinafter provided, based upon a verified report as herein provided. [Stats. 1917, p. 1599.]

Sec. 50. Whenever the term "supervisor" is used in this act it shall be taken to mean the "state oil and gas supervisor," the term "oil" shall include "petroleum," the term "petroleum" shall include "oil," the term "gas" shall mean natural gas coming from the earth, the term "operator" shall mean any person, firm or corporation drilling, maintaining, operating, pumping, or in control of a well in any territory which the supervisor determines to be oil or gas producing territory, the term "owner" shall include "operator" when any oil or gas well is operated or has been operated or is about to be operated by any person, firm or corporation other than the owner thereof, and the term "operator" shall include "owner" when any such well is or has been or is about to be operated by or under the direction of the owner, except that all the pro-

visions of this act relating to assessments for the purposes of this act based upon the annual production of oil or petroleum or sale of gas, as set forth in sections 22 to 45 inclusive of this act, shall apply only to a person, firm or corporation operating an oil or petroleum or gas well, and shall not apply to the owner of such well if some person, firm or corporation, other than such owner, has been actually operating the well during the whole period for which such annual charge is made, but in the event that the actual operation of any such well changes hands during such period, the charge shall be apportioned upon the basis of the oil or petroleum or gas produced, and the lien provided for in section 41 of this act shall be a lien against the property of each and all such operators. Words used in this act in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; and the neuter, the masculine and feminine; the singular number includes the plural, and the plural, the singular; "writing" includes "printing" and "typewriting." [Stats. 1929, p. 942.]

Sec. 52. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional. [Stats. 1915, p. 1419.]

Sec. 53. This act shall be liberally construed to meet its purposes and the director of the department of natural resources and the supervisor shall have all powers which may be necessary to carry out the purposes of this act, and the provisions of this act shall apply to any land or wells situated within the boundaries of an incorporated city where the drilling of oil wells is now or may hereafter be prohibited until all wells thereon have been abandoned as provided in this act. [Stats. 1929, p. 943.]

This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace and safety within the meaning of section 1 of article four of the constitution, and as such shall take effect immediately. The facts constituting such necessity are as follows:

At the present time in the oil and gas producing fields within the state there is now being blown into the air and wasted daily on the average approximately five hundred million cubic feet of gas. New fields producing heavily of natural gas are being opened up which will tend to add to the amount of natural gas being blown into the air and wasted and lost. [Stats. 1929, p. 943.]